FILED
MAY 25 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1941

No. 1218.

ART METAL CONSTRUCTION COMPANY, for Its Own Use and for the Use of McCLOSKEY & CO., INC.,
Petitioner, and Appellants Below.

v.

LEHIGH STRUCTURAL STEEL COMPANY,
Respondent and Appellee Below.

Respondent's Brief Contra Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

CHARLES H. WEIDNER,
18 South Fifth St.,
Reading, Pa.,
Counsel for Respondent.

Reading Eagle Press, Reading, Pa.

TABLE OF CONTENTS

	Page
Argument	3-11
Petitioner's statement of facts challenged	3-4
Parol evidence was admissible to show the circumstances under which the assignment was executed and how it was acted upon by the parties for the purpose of proving that the assignment was not an absolute one, but intended merely as collateral security to Lehigh	4-11

TABLE OF CITATIONS

	Page
Bryant v. Bryant, 295 Pa. 146, 153; 144 A. 904	8
Carroza v. Boxley, 203 F. 673	5
Cridge's Estate, 289 Pa. 331, 340	8
Fryer v. Rishel, 1 Walker (Pa.) 470	5
Goldman v. National Refrigerator Co., 120 Pa. Superior Ct. 458	9
Howell v. Wheelock, 115 Pa. Superior Ct. 599	8, 10
Kerr v. McClure, 266 Pa. 103	8
Ward v. Ziegler, 285 Pa. 557	7

TEXTS

	Page
American Jurisprudence, Vol. 20, Evidence, Sec. 1146.	8
Williston on Contracts, 3rd Ed., Vol. 2, Sec. 431	5
Williston on Contracts, Revised Edition, Vol. 2, Sec. 397, Page 1144	6

ARGUMENT

Petitioner's Statement of Facts Challenged

The petitioner misstates an important fact in this case when it says (Page 23 of its Brief) that Lehigh received $47,164.65 in excess of the amount of its contract with Bauman, which was $179,500.00. The admitted fact is that (R. 91 and 92) out of the total checks received from McCloskey and Company, Bauman received $62,354.42 and Lehigh received $173,629.58.*

The trial court affirmed the defendant's request for finding of fact No. 10 (R. 129), which reads as follows: "Lehigh received no more money out of the proceeds of the Bauman-McCloskey contract than what was actually owing by Bauman to Lehigh for work and materials furnished. Lehigh received no benefit or advantage of the work or materials furnished by Art Metal Construction Company."

The trial court found and stated (R. 133): "that although Lehigh actually received from McCloskey somewhat more than the $179,500** due

*This is less than the contract figure because of various credits and adjustments.

**Here the trial court used the contract figure, not the adjusted figure.

it from Bauman, it remitted all above that amount to Bauman either in payment of work which Bauman itself did under its contract with McCloskey (light steel work, etc.) or as a straight refund. In other words, although fully in its power to do so had the assignment been intended as an absolute one, it did not retain any money above the amount which Bauman owed it under its subcontract with Bauman for the structural steel."

The fact is also (R. 92) that as of November 19, 1931, Lehigh received a total of $153,234.95, and that it was not until December 23, 1932, that Lehigh received the full amount ever paid to it, which was $173,629.58.

Parol evidence was admissible to show the circumstances under which the assignment was executed and how it was acted upon by the parties for the purpose of proving that the assignment was not an absolute one, but intended merely as collateral security to Lehigh.

As stated in the opinion of the Circuit Court of Appeals (R. 153): "The broad question of when parol testimony may be received to vary the terms of a writing is not before us. The sole question here is whether, in conformity with the Pennsylvania decisions, evidence may be received to show that an assignment, unqualified in terms was made for collateral security only."

On the question of the admissibility of parol evidence to show whether an assignment absolute

on its face was intended merely as collateral security, the decisions of the Supreme Court of Pennsylvania were correctly applied. These decisions are in conformity with the rule applied in other jurisdictions and generally recognized by leading texts on the subject.

In Fryer v. Rishel and wife, 1 Walker 470 (Pa.), it was held that "an assignment absolute on its face may be shown to be only intended as a collateral security." The Supreme Court of Pennsylvania in a per curiam opinion said (page 472):

> "The question in the Court below as to the absolute, or conditional purpose of the assignment as intended by the parties, was one purely of fact dependent upon the surrounding and attending circumstances as well as the face of the paper. We cannot say that the Court erred in the submission of this fact to the jury, or that there was anything in so doing in conflict with the former decision of this Court when the case was here before."

In Williston on Contracts, 3rd Ed., Vol. 2, Sec. 431, it is stated:

> "Frequently an assignment in terms absolute is intended to operate merely as security for a debt, and this may be shown by parol."

In Carozza v. Boxley, 203 F. 673, it was held p. 674):

> "An assignment absolute in form of all moneys due a subcontractor for work under his contract could be shown, in an action by

the assignor thereon, to have been to secure a debt due to the assignees in an amount less than that due from the debtor."

The foregoing authorities support the ruling that parol testimony of either Lehigh or Bauman was admissible to show the expressed intention of the parties at the time of the execution of the assignment. However, there is in this case the additional circumstance that the parties themselves admit that the assignment was not intended as an absolute one but merely as collateral security to Lehigh, and the further fact that the contract between the parties was fully performed and discharged long before the plaintiff ever knew of any assignment, and their performance shows conclusively that they treated the assignment as collateral security. It is always relevant to show what construction the parties themselves have put upon a contract by looking at the circumstances and the results of their performance. In this case the plaintiff was not a donee beneficiary, but a creditor beneficiary, and in such case its rights rise no higher than Bauman. As stated in Williston on Contracts, Revised Edition, Vol. 2, Sec. 397, Page 1144: "In a case of creditor beneficiary the situation is substantially different from that arising where the third person is a donee beneficiary. The creditor's right is purely derivative, and if the debtor no longer has a right against the promisor the creditor should have none."

In Ward v. Ziegler, 285 Pa. 557, the syllabus, supported by the opinion, reads as follows:

> "Where it is admitted that the whole of an agreement is not set forth in the writing, either party has the right to show what the true facts were regarding the matter thus resting in parol.
>
> "Where automobile tires are delivered to defendant, and he gives, at the time, judgment notes, and plaintiff claims that the notes were given in absolute payment of the tires and defendant claims that the notes were given as security for the proceeds of the tires as they were sold, and plaintiff in his testimony admits that defendant was to pay for them as they were sold, the transaction was not an outright sale, but in reality one on consignment.
>
> "In such case plaintiff cannot invoke the rule that parol evidence cannot be received to vary the terms of a written instrument.
>
> "The parol evidence rule exists not for reasons of public policy but to protect those who put their entire contract in writing."

In the course of its opinion the Supreme Court of Pennsylvania said (page 559):

> "We are not dealing here with such a situation as was presented in First Nat. Bank of Hooversville v. Sagerson, 283 Pa. 406, or First Nat. Bank of Donora v. Purcell, 284 Pa. 355, where it was denied that there was any oral understanding oustide of the note sued on but with one where admittedly there was such an oral understanding."

In Kerr v. McClure, 266 Pa. 103, the Supreme Court of Pennsylvania said (p. 105):

> "Defendant himself testified that the assignment of the policies to him was not an absolute one, but as collateral security for his existing claim against the husband, and for such other payments as he might thereafter make to the husband or to keep the policies alive. The whole of the agreement, therefore, not being set forth in the writing, either party had the right to show what the true facts were regarding the matter thus resting in parol: Federal Sales Co. v. Farrell, 264 Pa. 149, 153:"

Other authorities recognizing the application of the parol evidence rule in accordance with respondent's contention are:

Bryant v. Bryant, 295 Pa. 146;

Cridge's Estate, 289 Pa. 331, 340;

Howell v. Wheelock, 115 Pa. Super. Ct. 599; and

American Jurisprudence, Vol. 20, Evidence, Sec. 1146.

Even if there were no parol evidence in this case of the expressed intention of the parties at the time the assignment was executed, or if we concede merely for the sake of argument that the assignment was an absolute one in the beginning, nevertheless the admitted evidence clearly shows what the real intention of the parties was and how they actually discharged their contract of assign-

ment. It is an admitted fact (R. 92) that Lehigh obtained out of the proceeds of the McCloskey checks no more than what was actually owing to it for the structural steel work which it was obliged to do under its contract with Bauman as evidenced by letters dated May 11 and May 16, 1931. It was admitted by Arthur W. Benham, who represented Bauman Iron Works during the negotiations, that the proceeds of the McCloskey checks were divided between Bauman and Lehigh according to the value of the materials furnished by the respective parties (R. 101). It was on this basis that the accounts between Bauman and Lehigh, with reference to the materials furnished on the court house job, were concluded as of February 2, 1933 (R. 93). Therefore, it is obvious that the assignment was not an absolute one, but was merely intended as collateral security, because after it served its purpose the Bauman-McCloskey contract was actually assigned by Bauman to the plaintiff, Art Metal Construction Company.

Under these circumstances the applicable rule is stated in Goldman v. National Refrigerator Co. Inc., 120 Pa. Superior Ct. 458, where it was said (page 461):

> "'It is always competent for the parties to a written contract to show that it was subsequently abandoned in whole or in part, modified, changed, or a new one substituted. And this may be shown by parol, by showing either an express agreement, or actions necessarily in-

volving the alteration': Holloway v. Frick, 149 Pa. 178, 180, 24 A. 201; Germantown Dairy Co. v. McCallum, 223 Pa. 554, 72 A. 885."

In the instant case the parties to the assignment could have varied their contract at any time so as to discharge each other as they saw fit. This could be done even though the plaintiff was a creditor beneficiary of Bauman, for the reason that plaintiff never knew of the assignment and of course did not bring suit upon it until almost six years after the assignment was completely discharged by the parties thereto.

The petitioner relies upon the case of Speier v. Michelson, 303 Pa. 66. The distinction stated by the Superior Court of Pennsylvania in the case of Howell v. Wheelock, 115 Pa. Superior Ct. 599, is applicable here. The Superior Court of Pennsylvania in that case said that, "Although the Supreme Court of Pennsylvania in some of the late cases, of which Gianni v. Russell & Co., Inc., supra (281 Pa. 320), and Speier vs. Michelson, 303 Pa. 66, 154 A. 127, are noted examples, made more stringent the rules respecting the admission of evidence to vary and alter written instruments, none of the cases have held that under all circumstances oral evidence is inadmissible to explain the intention or the action of the parties to a written instrument." In the instant case no one could deny that the parties intended the assignment as

collateral security because they clearly treated it as such in performing and discharging their contract.

We respectfully submit that the District Court and the Circuit Court of Appeals, to which Court the case was twice appealed, have given full and careful consideration to the facts, and have correctly applied the decisions of the appellate courts of Pennsylvania to those facts, and that the petition for a writ of certiorari should, therefore, be denied.

CHARLES H. WEIDNER,
Counsel for Respondent.